

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 994 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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NITINKUMAR SAKALCHAND SHAH

Versus

CHANDRAHASH PUNJALAL PARIKH

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Appearance:

MR MB GANDHI for Petitioners

MR BG JANI for Respondents

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CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 27/09/96

ORAL JUDGEMENT

The petitioners have assailed the judgment and decree for eviction recorded by the courts below on the grounds of sub - letting, transfer and assignment of the demise premises, under Section 13(1)(e) of the Bombay Rents, Hotel, and Lodging House Rates Control Act, 1947 ('Bombay Rent Act') and also on the ground of acquisition

of suitable alternative accommodation by tenant, under Section 13(1)(1) of the Bombay Rent Act. by invoking powers under Section 29(2) of the Bombay Rent Act.

The conspectus of relevant material facts may be articulated at the outset. The respondents instituted a legal battle by filing HRP Suit No.874 of 1983 against the petitioners to recover possession of the demise premises on the following three grounds; of

(i) arrears of rent from 8.12.1980;

(ii) acquisition of suitable alternative

accommodation.

(iii) sub letting, transfer or assignment of the demise premises.

The demise premises are consisted of one room and one kitchen bearing Municipal Census No. 1302/3 situated in the city of Ahmedabad. One deceased Sankalchand was let the demise premises in 1957 at the monthly rent of Rs.20/- by virtue of rent note Ex.17. Original tenant Sankalchand died on 12.7.1982. Notice of eviction Ex.19 was given on 4.1.1983. Reply to the said notice was given which is at Ex./20. Eviction suit came to be filed in the Small Cause Court at Ahmedabad on 9./3.1983 on the aforesaid three grounds. The petitioners are the original defendants Nos.1 and 2 and respondents are the original plaintiffs. Therefore, they are referred to as plaintiffs and defendants for the sake of convenience and brevity.

According to the case of the plaintiffs-landlords, original tenant Sankalchand when he was alive, had constructed his own residential bungalow in Shreepal Nagar and during his life time, and he had shifted with his family in the newly acquired bungalow and after shifting, he had sub let or illegally transferred or assigned the demise premise to original defendant No.2 -petitioner No.2 herein. Thus, according to the case of the plaintiffs, father of defendant No.1 -original tenant had constructed suitable residential bungalow and he had sublet, transferred or assigned the demise premises to defendant No.2. Rent was in arrears from 8.12.1980. Eviction suit came to be filed after service of notice.

The defendants appeared and resisted the suit by filing written statement Ex.9 and resisted the claim of the

plaintiffs. They contended that they have not acquired any suitable alternative accommodation and that there was no sub-letting, transfer or assignment by father of defendant No.1 to defendant No.2. They also pleaded that defendant No.2 is the maternal uncle of defendant No.1. Dispute of standard rent was also raised.

The Trial court after having examined the facts and circumstances and considering the pleadings of parties, raised issues at Ex 13. The plaintiffs relied on the following oral evidence :

- (i) Chandreshbhai Parikh, plaintiff No.1 at Ex.16
- (ii) Jayantilal , Ex.38;
- (iii) Sharad Bachubhai Ex.39.

The defendants relied on the oral evidence of the following witnesses:

- (i) Nitinkumar Sankalchand Defendant No.1 at Ex.46;
- (ii) Bachubhai Ratilal, defendant No.2, Ex. 66 and
- (iii) Niranjanbhai Ratilal Shah, at Ex. 110.

The defendants also relied on the documentary evidence to which reference will be made as and when required at an appropriate stage hereafter.

Upon analysis and assessment of the evidence, the Trial court decreed the suit for possession by passing judgment and decree dated 18.10.1989 holding (i) that defendant tenant was in arrears of rent and neglected to pay the rent; (ii) that defendant No.2 is inducted by defendant No.1 and his father in the demise premises illegally and that defendant No.2 is the sub-tenant; (iii) that defendant No.1, son of the original tenant has constructed a bungalow in Shripal Nagar and has acquired suitable alternative accommodation and (iv) standard rent was fixed at Rs. 20/- per month.

Being dissatisfied by the judgment and decree recorded by the Trial court against the original tenant, they challenged the validity and legality thereof by filing Civil Appeal No. 157 of 1989 before the Appellate Bench of the Small Cause Court at Ahmedabad which came to be rejected on 15.4.1996 confirming the decree for eviction on the ground of acquisition of suitable alternative residential bungalow and also on the ground of unlawful sub letting, transfer and assignment of the demise

premises to defendant No.2.Hence,this revision petition at the instance of the unsuccessful defendants under Section 29(2) of the Bombay Rent Act.

During the course of hearing of this revision,Civil Application No. 5360 of 1996 under Order 41,Rule 27 of the Code of Civil Procedure,1908 ('the Code') is submitted by the petitioners -original defendants- for additional documentary evidence . It is submitted on behalf of the petitioners that production of documentary evidence is necessary to show relationship between the petitioners-original defendants and that sub-tenant who is the brother-in-law of the deceased tenant Sankalchand was staying with the deceased in the demise premises since long and that construction of bungalow made by the deceased -tenant Sankalchand was prior to 1960. It is also contended that while cleaning the house,additional documentary evidence could be traced out and,therefore, permission may be given for production of additional evidence in the revision. The submissions made on behalf of the petitioners are seriously controverted by the learned advocate for the original plaintiffs.

Provisions of Order 41,Rule 27 of the Code read as under:

(1)The parties to an appeal shall not be entitled to produce additional evidence,whether oral or documentary, in the Appellate court.But if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted,or

(aa) the party seeking to produce additional evidence,establishes that notwithstanding the exercise of due diligence,such evidence was not within his knowledge or could not,after the exercise of due diligence,be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment,orfor any other substantial cause.

the appellate court may allow such evidence or document to be produced,or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission."

It could very well be seen from the aforesaid provisions that under Order 41, Rule 27, the appellate court has power to allow a document to be produced and witness to be examined. However, the said power to permit production of additional evidence whether oral or documentary, is permissible under certain contingencies even in an appeal.

(i) that the trial court had refused to admit evidence even though it ought to have been admitted.

(ii) that the evidence was not available to the party notwithstanding exercise of due diligence.

(iii) that the appellate court required the additional evidence so as to enable it to pronounce judgment.

The additional evidence is sought to be produced in a revision under Section 29(2) of the Bombay Rent Act. It is a settled proposition of law that finding of fact should not be disturbed and there should not be reassessment or reappraisal of the evidence and the conclusion on facts recorded by the appellate court. The finding of fact recorded by the lower courts cannot be substituted on reassessment merely on the ground that a second view is possible. Therefore, High court cannot examine legality of a decree on facts which were not before the lower appellate court and which concurred with the findings of fact recorded by the trial court. The revisional jurisdiction of this court under Section 29(2) extends only to correct errors of law or to removal of infirmities like misreading of evidence, non-application of mind to the vital facts etc.

Keeping in mind the underlying design and purport of revisional powers and analogous provisions of Order 41, Rule 27 of the Code, the High court ordinarily should not permit additional evidence to be produced unless exceptional case is made out by way of new and subsequent events which the court finds necessary for efficient and effectual adjudication of the dispute between the parties.

It must also be noted that Order 41, Rule 27 which deals with question of producing additional evidence cannot be

invoked for the benefit of a party even in an appeal. Production of additional evidence and new and subsequent events under Rule 27 must be in pursuance of requirement of the court and not because party desires to produce it for his own benefit. Order 41, Rule 27 relates to an appeal and not revision. If, however, new and subsequent events have occurred during the pendency of the revision which have material bearing and which are relevant and which courts think them necessary for substantial justice, then in that case, the court can permit additional evidence to be produced on the analogous principle of order 41, Rule 27 or under Section 151 during the pendency of the revision. Obviously, the revisional court then will have to consider whether for proof of such event, the matter should be remanded and if yes, to which court. Ordinarily, the revisional court must confine itself to the circumstances of the case on record when the judgment under appeal was delivered. However, in exceptional cases, even if need be, exercising analogous provisions of Order 41, Rule 27 read with Section 151 of the Code, additional evidence in pursuance of the requirement of the court and not because the party desires to produce it for his benefit, could be considered and in very exceptional cases may be permitted to be produced. It could be accepted in rarest of rare cases.

The contention of the petitioners is that while cleaning their house, some of the documents had been traced out and, therefore, these documents are relevant for the purpose of determining controversy between the parties. Thus, it is admittedly not a case that the trial court had refused to admit the said evidence though the same ought to have been admitted. It is also not shown to the satisfaction of this court that the proposed documentary evidence was not available to the party notwithstanding exercise of due diligence. Again, on appreciation of the facts and circumstances, this court is of the opinion that the proposed additional evidence is not required by this court so as to enable this court to pronounce the judgment. Not only that, the proposed additional documentary evidence is such which could have been produced at the relevant time from the original source. Voluminous documentary evidence in the shape of copy of the ration-card, copy of the application for registration for ration-card, receipt of gas cylinder or copy of certificate purported to have been issued by the Secretary of Gopal Nagar Co-operative Housing Society, is sought to be produced at the stage of revision which cannot be said to have been acquired after decision on merits in the appeal and the same cannot be characterised as by way of new or subsequent events after hearing of

the case on merits in the appeal. Therefore, in the opinion of this court, the contention to permit additional evidence sought to be produced along with the application dated 1/7/1996 is found meritless in light of the facts of the case and in the background of the aforesaid proposition of law. The true test for deciding application for additional evidence should be- whether the appellate court or this court in rarest of rare cases could pronounce the judgment on the material before it without additional evidence sought to be produced? The application for additional evidence in the revision and the contentions for production of additional evidence are also not fulfilling the aforesaid true trust. Therefore also, the application is required to be rejected. Accordingly, it is rejected.

The courts below have concurrently and consistently recorded the finding of fact while granting decree for ejectment on the ground of suitable alternative accommodation and unlawful sub-letting and illegal transfer and assignment of the demise premises. The jurisdictional scope of revisional court under Section 29(2) of the Bombay Rent Act though little wider than one under Section 115 of the Code, is still circumscribed to correct the impugned decision or decree which is not in accordance with law.

Thus, decision in appeal against the judgment of the District court can be revised under Section 29(2) by this court provided this court is fully satisfied that the impugned judgment or decree was not according to law. The powers of this court are circumscribed and cannot be exercised like power of an appellate court. This court cannot appreciate and reanalyse the evidence and come to a different conclusion on what has been rightly arrived at by both the courts below while exercising revisional power.

In exercising revisional power under Section 29(2), the High court must ensure that principles of law have been correctly borne in mind by the courts below. Secondly, the facts have been properly appreciated and decision arrived at taking all relevant facts and circumstances into consideration. In order to warrant interference in revision like one on hand, the decision must be such a decision which no reasonable man could have arrived at. In the guise of revisional power, substitution of one view,, where two views are possible, is also not permissible. If a possible view has been taken, this court would be exceeding its jurisdiction under Section 29(2) if it substitutes its own view in place of that of

the courts below, because it considers it to be a better view. It must be remembered that mere fact that the High court would have taken a different view is wholly irrelevant.

The issue of eviction concurrently recorded by the courts below under Section 13(1)(1) has remained unassailable in light of the facts of the case .Section 13(1)(1) provides a ground for eviction in favour of landlord where it is shown to the satisfaction of the court that the tenant, after the coming into operation of the Act, has built, acquired vacant possession of or been allotted a suitable residence.The object of Section 13(1)(1) is quite clear and obvious. Clause (1) has been deliberately restricted to residential premises which serve as a roof over the tenant's head. This clause is provided with intention and design that a tenant should not have more than one residential premises at a time. In its wisdom, the Legislature has rightly anticipated further shortage of residential premises and the increasing need for such premises.By empowering the court with power under Section 13(1)(1),the legislature has intended that if the existing tenant vacates the premises,the same can be made available to another needy person to have a roof over his head more so,in a country like ours, where millions of people are waiting for residential accommodation, it is a matter of common understanding,this is not in dispute,that in India, millions of persons are not provided with reasonable and sufficient roof over their heads.

It is in this context that the tenant cannot be allowed to stock to the premises or lock the premises or hand it over to a third person alleging his intention to return after a lapse of number of some years. If such a plea is permitted, it will defeat and frustrate the purpose and object of the clause (1). This clause has,therefore,been founded upon a sound public legislative policy and society's interest.If the court is satisfied that the conditions laid down in Section 13(1)(1) are fulfilled, obviously then, the tenant would not be entitled to protection of rent legislation and the landlord would be qualified to obtain a decree for possession on that ground. If the landlord proves successfully and to the satisfaction of the court that the tenant has either (i) sub let the residence;(ii) has acquired vacant possession of suitable residence or (3) has been allotted suitable residential accommodation, the tenant is liable for ejectment and court is bound to pas a decree for ejectment in favour of the landlord and against the tenant.



After having examined the ipugned judgments of both the courts below and the facts and circumstances emerging from the record, the aforesaid conditions attracting rigors of provisions of Section 13(1)(1) are successfully satisfied leaving no scope for this court to interfere with the concurrent findings of fact recorded by the courts below. It is an admitted fact that the tenant has constructed residential bungalow in Shripalnagar ,Usmanpura,Ahmedabad and that defendant No.1 alongwith deceased tenant have gone to reside in the said bungalow. Deceased tenant died in 1982 in the new bungalow. It is also not in dispute that newly constructed bungalow is consisting of ground floor and first floor.It is also an admitted fact that on the ground floor, there are four rooms and on the first floor also,there are four rooms while,on the second floor,there is one room and a gallery. It is also an admitted fact that thereafter,one more room was added in the bungalow. Thus,there are as many as 11 rooms in the newly constructed bungalow. Newly constructed bungalow is more than sufficient and suitable even for both the families of the defendants even if they are considered to be members of family of the deceased tenant. In reality, defendant No.2 is rightly found to be not a member of the family of the original tenant Sankalchand . But even assuming that he also can be considered as a member of the deceased tenant, then also, newly constructed bungalow is so big, so sufficient that it could cater to the needs of all the members of families of both the defendants. In the opinion of this court, the findings of fact recorded by both the courts below concurrently that the tenant has acquired suitable residential bungalow by constructing his own house after coming into operation of the Bombay Rent Act, is fully justified requiring no interference at all.

In order to get rid of ejectment decree under Section 13(1)(1),different pleas came to be raised by the defendants. Firstly, it was contended that the bungalow was constructed by the deceased tenant prior to coming into force of the Bombay Rent Act. This was found totally incorrect and wrong stand. Therefore,it is rightly not pressed in this revision. The second contention which is raised in this revision is that the bungalow was constructed of 1959 and therefore, for a long time, the landlord had sat idle and therefore, he was not entitled to ejectment decree on the ground of waiver. This submission is not sustainabe. factually and legally. There is no evidence led by the defendants to show as to when construction of the bungalow was

raised. This should have been proved by documentary evidence. Mere production of a share certificate of the co-operative society in 1959 does not ipso facto lead to an inference that he had constructed a house in 1959. Allotment of a plot is one thing and construction of a suitable residential bungalow is different. The question in focus was as to when the bungalow was constructed and it is not proved that it was constructed in 1959. Again, this contention cannot be allowed to be raised for the first time in revision, not being a pure question of law. In fact, it is not proved that there was waiver on the part of the landlords, but it appears, there is wavering mind of the tenant. Be that as it may, the decree recorded on the ground of Section 13(1)(l) by the Trial court and confirmed by the Appellate court requires no interference at all.

Decree for eviction is also granted on the ground of Section 13(1)(e). Section 13(1)(e) provides ground of eviction if the tenant has unlawfully sub let, assigned or transferred his interest in the demise premises. Expression 'unlawfully' was subsequently added in 1959. Thus, the term 'unlawfully' has reference to Section 15. In Section 15, non-obstante clause is 'Notwithstanding anything contained in any law'. As against this, such clause in Section 13, says 'Notwithstanding anything contained in this Act'. Again, the opening words of Section 13 are material which speak 'but subject to the provisions of Section 15. It may be mentioned that Section 15 injects a prohibition, after coming into operation of this Act, against any sub letting, assigning or transfer wholly or partly of premises. If the material conditions of Section 13(1)(c) read with Section 15 are established, the court is obliged to record a decree for eviction in favour of the landlord and against the tenant.

In the present case, both the courts have consistently and concurrently found that the tenant has unlawfully transferred or assigned his interest in the demise premises to defendant No.2 who is maternal uncle of defendant No.1. In other words, the brother-in-law of the deceased tenant, as is rightly held by both the courts below, cannot be said to be a member of family of the deceased tenant even while resorting to provisions of Section 5(11)(c). In order to qualify one self to be a tenant under Section 5(11)(c), a person must satisfy the following conditions :

- (i) he must be a member of the tenant's family;
- (ii) he should be residing with the tenant at the time

or within three months immediately preceding the date of death of the tenant;

Section 5(11)(c) reads as under ;

"5. In this Act unless there is anything repugnant to the subject or context-

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(11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes-

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(c) (i) in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant as may be decided in default of agreement by the court, and

(ii) in relation to premises let, for business, trade or storage, any member of the tenant's family carrying on business .trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage as the case may be, in the said premises and as maybe decided in default of agreement by the court".

It could very well be seen from the aforesaid provisions that by adding Section 5(11)(c) by a subsequent amendment, the Legislature has provided a special mode of succession to the tenancy rights or leasehold rights. In short, the object of the said provisions appears to create irremovability from possession to those who were in need of it, but has limited it to the members of the tenant's family. Ordinarily, a brother-in-law cannot be said to be a member of the tenant's family. It is not shown from the evidence that defendant No.2-brother-in-law of the deceased tenant, was as such, a member of the tenant's family and was residing with him at the relevant time. It is, therefore, rightly concluded by the courts below that defendant No.2 is a sub-tenant and is in unlawful, and unauthorised occupation after the tenant shifted to the newly constructed suitable big bungalow. It is, therefore, clear from the record of the present case that after the death of original tenant in 1982, his son defendant No.1- was accepted as a tenant

pursuant to the agreement entered into by the legal heirs of the deceased tenant.

In the opinion of this court, the decree for possession on the ground of Section 13(1)(e)- unauthorised transfer or assignment or subletting by the tenant to defendant No.2 is quite justified requiring no interference.

After having examined the aforesaid facts and circumstances and the evidence, this court finds that the present revision challenging the ejectment decree on the ground of Section 13(1)(e) and 13(1)(l) of the Bombay Rent Act recorded by both the courts concurrently and consistently, is totally, meritless and requires to be dismissed. With the result, the revision is dismissed with costs. Notice is discharged.

Learned advocate for the petitioners Mr. Gandhi submitted that three years' time may be granted for eviction of the premises. Since the tenant has acquired suitable residence being a bungalow and defendant No.2 is held to be a sub-tenant, this court finds no merit in the said submission. However, in the larger interest of justice and to facilitate parties to vacate the premises and hand it over to the respondents-landlords, this court is inclined to grant time till 31st January 1997. In other words, decree for possession on the aforesaid grounds shall not be executed against the tenant till 31st January 1997 on condition to file an undertaking by the petitioners-original defendants-tenants incorporating the following terms, over and above usual terms:

- (i) Each one of them shall file an undertaking within a period of four weeks from today stating that possession of the demise premises shall not be parted with in any manner and it shall be handed over only to the respondents -original plaintiffs-landlords;
- (ii) that the entire arrears of rent thus far due shall be paid within four weeks from today.
- (iii) that the amount equivalent to the rent shall be paid periodically to the landlords by defendant No.1 till premises are handed over as aforesaid.

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